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BARRY FITZGERALD,
Appellant-Defendant,

No. 49A02-0709-CR-789

STATE OF INDIANA,
Appellee-Plaintiff.

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Case Summary

Barry Fitzgerald appeals his aggregate sentence of eighteen years for multiple felony convictions. Specifically, he contends that the trial court erred in ordering some of his sentences to run consecutively because the court did not identify any aggravators. Because the trial court identified two aggravators and explained why it was ordering some of his sentences to run consecutively, we conclude that the court did not abuse its discretion and therefore affirm.

Facts and Procedural History

On September 20, 2005, the State charged Fitzgerald with Count I: Class B felony carjacking; Count II: Class B felony robbery; Count III: Class A misdemeanor carrying a handgun without a license; Count IV: Class A misdemeanor resisting law enforcement; and Count V: Class A misdemeanor resisting law enforcement under Cause No. 49G06-0509-FB-160621 (“Cause No. 160621”). The following day, September 21, 2005, the State charged Fitzgerald with Count I: Class B felony robbery; Count II: Class B felony carjacking; Count III: Class D felony theft; and Count IV: Class B felony robbery under Cause No. 49G06-0509-FB-162499 (“Cause No. 162499”). On November 30, 2005, Fitzgerald entered into a plea agreement that covered both cause numbers. Specifically, Fitzgerald pled guilty to all felony counts under both cause numbers, and the State agreed to dismiss the misdemeanor counts under Cause No. 160621. According to the plea agreement, there was a “cap of 20 years on [the] executed portion of [Fitzgerald’s] sentence.” Appellant’s App. p. 24, 75 (capitalization omitted).

At the guilty plea hearing, the State presented the factual basis for the charges under Cause No. 160621 as follows:

On September 19th of 2005, Danny Minaya was stopped at a red light at Michigan and Tibbs when the defendant, Barry Fitzgerald, and another black male asked for a ride and got into his vehicle. Mr. Fitzgerald got into the front seat. When they reached the alleged destination of Tibbs and Cossell Mr. Fitzgerald pulled out a gun and put it into the abdomen of Mr. Minaya. Mr. Fitzgerald then demanded money from Mr. Minaya. Mr. Minaya gave him his wallet, which had approximately thirty dollars, some credit cards, Blockbuster card, driver's license. Mr. Minaya was then forced to exit the vehicle, and the, the defendant and the other male drove off. The police were called, and an Indianapolis, Indianapolis Police Department officer, Conrad Simpson, was dispatched to Michigan and Tibbs on the report of the robbery/carjacking. He was informed that the suspects were two black males in a blue Chevy Lumina, which was the car previously described, and it had dealer plates on it. The officer observed this vehicle with the two suspects in it on Michigan Street. The officer pulled a U-turn and got behind the vehicle. The vehicle, the driver of the vehicle accelerated, and the suspects turned northbound on Holmes. They then, both of them jumped out of the vehicle with the, with it still in gear and driving forward, and the car went over the curb and into the front lawn and into I believe the railing of a residence at 2707 West Walnut Street. The defendant fled on foot, but he was apprehended by police in the backyard of a residence at 715 Warman Street. The defendant had a Baikal handgun on him, and it did have a round in the chamber and a magazine with more rounds. After, after they caught the defendant the police officers went back to the Chevy Lumina and found the defendant's cell phone, which he admitted was his, with a phone number of 908-7816, in the abandoned Chevy, the blue Chevy Lumina.

Tr. p. 17-19. The State presented the factual basis for the charges under Cause No. 162499 as follows:

On August 30th of 2005, Lonnie Eaton, an employee of the Steakhouse Quality Meats, Incorporated, was sent on a delivery run to 765 Bellevue Place. He was supposed to meet a customer named Ty. When he arrived, the customer did not answer the door. He then called—as he was trying to decide what to do, two black males approached him and they said he was inside. He then called the phone number, number 908-7816, at which point the alleged person named Ty said that he was in the restroom . . . and would come to the door shortly. As Mr. Eaton was standing at the door, . . . the

two males then came back. They discussed buying steaks with him, then he went back to the front door, at which point one of them came from behind, put him in a headlock, and pointed a gun at this [sic] head, and then his wallet and car keys were taken and the two males then drove off with his truck, a 2001 Toyota Tundra, and his wallet and keys. After that, on September 8, 2005, David Gurrola had . . . phone conversations with a man named Ty, phone number 908-7816, and they decided to meet in order for Mr. Gurrola to buy a chainsaw off of Ty. They got, Ty got in the vehicle with Mr. Gurrola and they were driving to 10th and Sheffield. When they stopped there Ty got out of the car and went around to the driver's side, pulled on the defendant's shirt sleeve, and pointed a black pistol—or, not the defendant's shirt sleeve. Mr. Gurrola's shirt sleeve. Pointed a black pistol at Mr. Gurrola and demanded . . . his wallet. Mr. Gurrola . . . gave him his wallet, threw his car keys into the air, and ran away. Mr.—after the events happening under 05-160621, when the, when Mr. Fitzgerald was found and they realized that the cell phone with the number 908-7816 was his cell phone, the police then took photo arrays with his picture in it and went back to Lonnie Eaton and David Gurrola independently, and both of them positively I.D.'d Barry Fitzgerald

Id. at 19-21.

The sentencing hearing was held on December 27, 2005.¹ Under Cause No. 160621, the trial court sentenced Fitzgerald to below-advisory terms of six years for Count I: Class B felony carjacking and six years for Count II: Class B felony robbery, to be served concurrently. In addition, the court ordered Fitzgerald to receive substance abuse treatment. Under Cause No. 162499, the trial court sentenced Fitzgerald to a below-advisory term of six years for Count I: Class B felony robbery, a below-advisory term of six years for Count II: Class B felony carjacking, an advisory term of one and one-half years for Count III: Class D felony theft, and a below-advisory term of six years for Count IV: Class B felony robbery. The trial court ordered the sentences in Counts I and II to be served consecutively; the sentences from the remaining counts were to be

¹ We note that these crimes were committed, and Fitzgerald was sentenced, after the April 25, 2005, amendments to our sentencing statutes.

served concurrently. In addition, the court ordered Fitzgerald to receive substance abuse treatment. Finally, the trial court ordered the sentences in Cause Nos. 160621 and 162499 to be served consecutively, for a total executed sentence of eighteen years. Fitzgerald sought, and received, permission to file this belated appeal.

Discussion and Decision

Fitzgerald raises one issue on appeal. Specifically, he contends that the trial court erred in running some of his sentences consecutively because the court did not identify any aggravators. In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. *Marcum v. State*, 725 N.E.2d 852, 864 (Ind. 2000), *reh'g denied*. Specifically, the trial court must articulate, explain, and evaluate the aggravating circumstance or circumstances that support consecutive sentences. *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002); *see also Childress v. State*, 848 N.E.2d 1073, 1080-1081 (Ind. 2006) (noting that when a trial court imposes consecutive sentences where not required to do so by statute, we will examine the record to ensure that the court explained its reasons for selecting the sentence it imposed). The decision to impose consecutive sentences is entirely within the trial court's discretion. *Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006); *Kilpatrick v. State*, 746 N.E.2d 52, 62 (Ind. 2001).

At the sentencing hearing, the trial court stated:

I do accept that the early plea is a mitigator, and I also accept the hardship to dependents, although I, I said this last week. When you, when you choose to do drugs and rob, leaving your children at home, there's a bit of a disconnect for me, but I accept his wife's sincerity that he is a loving father and that their children miss him. But I will just say this, Mr. Fitzgerald, there's a lot of people who do drugs and forge, and *it doesn't involve a weapon and it doesn't involve threatening somebody's life, and that is a big concern to me, that your drug addiction got to the point where you were*

putting other people in harm's way. I'm not suggesting that forgery is a good thing to do, but it's far less harmful, and, and it would be the type of crime that where the Court could order treatment immediately. Your track record on probation isn't that good, so it's got me a little concerned, but I, I think I've come up with something that would make some sense, and I'll, I'll spell it out in general, and then specifically in a minute.

Tr. p. 31-32 (emphases added). The court then explained that it ran the carjacking sentence consecutive to the robbery sentences because the carjacking sentence was eligible for community corrections placement. The court said that if it ordered community corrections placement right now, the Department of Correction would put a detainer on Fitzgerald and then he would not be able to receive substance abuse treatment, which he needed.

After reading the trial court's oral sentencing statement, it is clear that the trial court found two mitigators, Fitzgerald's early guilty plea and the hardship to his dependents. And although the trial court did not use the word "aggravators," it is apparent that the court, indeed, found two aggravators, the nature and circumstances of the crimes—specifically, Fitzgerald, who was addicted to drugs, was endangering people—and Fitzgerald's track record while on probation.² Although it would have been preferable for the court to have clearly articulated the aggravators, there is no requirement for trial courts to use the magic words of "aggravators" or "aggravating circumstances." A fair reading of the trial court's oral sentencing statement reveals that the trial court identified two mitigators and two aggravators, balanced them against each other, and came to a sentencing decision that includes below-advisory terms for all the Class B felonies and the advisory term for the Class D felony. The court then carefully decided

² Although Fitzgerald's attorney conceded at the sentencing hearing that Fitzgerald's criminal history is an aggravator, *see* Tr. p. 28, the trial court does not appear to have listed it.

what counts it wanted to run consecutively so that Fitzgerald could receive substance abuse treatment and be eligible for community corrections placement. The trial court did not abuse its discretion in ordering some of Fitzgerald's sentences to run consecutively.

Affirmed.

MAY, J., and MATHIAS, J., concur.